Filed 8/5/19 Ibanez v. Performance Air Service, Inc. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CARLOS IBANEZ, Plaintiff and Appellant, v. PERFORMANCE AIR SERVICE, INC., et al., Defendants and Respondents.	H044826 (Santa Clara County Super. Ct. No. CV293164)

I. INTRODUCTION

Appellant Carlos Ibanez was injured on March 14, 2014, while working on a construction site in Sunnyvale. He brought a personal injury action against defendants and respondents Performance Air Service, Inc. (Performance Air) and its employee, Brian Pacheco, among others. Defendants demurred to the second amended complaint (the operative pleading) on the ground that the action was time-barred under the two-year statute of limitations set forth in Code of Civil Procedure section 335.1[1] for personal injury actions.

Ibanez opposed the demurrer on the ground that the section 335.1 two-year limitations period was tolled as to defendant Pacheco pursuant to section 351, which

[1] All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

provides: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." Pacheco alleged that "for personal health reasons" he had been "been continuously absent from the State of California from approximately May 2015 to the present."

The trial court determined that the two-year limitations period provided by section 335.1 was not tolled because application of section 351 tolling provision in this case would violate the commerce clause of the United States Constitution (U.S. Const., Art. I, § 8, cl. 3). The trial court therefore ruled that the action was time-barred under section 335.1, sustained the demurrer to the second amended complaint without leave to amend, and entered an order of dismissal.

For the reasons stated below, we conclude that under the facts of this case the commerce clause is not implicated as to defendant Pacheco, and consequently the section 335.1 limitations period is tolled under section 351 while Pacheco is absent from the state. We will therefore reverse the order of dismissal.

II. FACTUAL BACKGROUND

Our summary of the facts is drawn from the allegations of the second amended complaint, since in reviewing a ruling sustaining a demurrer without leave to amend we assume the truth of the properly pleaded factual allegations. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

On March 14, 2014, Ibanez was working in the course and scope of his employment at a construction site in Sunnyvale. At the same time, defendant Pacheco, an employee of defendant Performance Air, was working at the construction site on a

ladder above Ibanez. Pacheco allegedly caused or allowed a sheet metal wye[2] to fall on Ibanez, seriously injuring him.

About two months later, in May 2014, defendant Pacheco sustained major head injuries in a motorcycle accident. Pacheco's family moved him to Massachusetts "solely to facilitate his convalescence and for the purpose of being cared for by members of his family." Pacheco is unable to care for himself and in 2015 his father and sister were appointed conservators of his person and estate by the Santa Clara County Superior Court. Since May 2015 Pacheco has been continuously absent from the state of California for "personal health reasons" unrelated to any business, commerce, or employment purposes. Further, "he has not crossed any state lines for the purpose of working, earning money, making investment decisions, or being involved in any type of commerce . . . ."

III. PROCEDURAL BACKGROUND

On March 24, 2016, Ibanez filed a personal injury complaint naming Performance Air and Pacheco as defendants, among defendants not involved in the present appeal. On May 29, 2016, Ibanez filed a first amended complaint. Defendants responded by filing a demurrer[3] on the ground that the action was time-barred under section 335.1, the two-year limitations period for personal injury actions, since the complaint was filed more than two years after Ibanez's March 14, 2014 accident. Ibanez opposed the demurrer and the trial court sustained the demurrer with leave to amend.

Thereafter, Ibanez filed a second amended complaint that included causes of action for negligence and premises liability. Defendants again demurred on the ground that the action was time-barred under the two-year limitations period for personal injury actions provided by section 335.1. Ibanez opposed the demurrer, arguing that the two-

[2] A wye is "a Y-shaped part or object." (Merriam-Webster Dictonary online, <https://www.merriam-webster.com/dictionary/wye [as of July 30, 3019], archived at <http://peram.cc/33W6-E5HZ>.)

year limitations period was tolled pursuant to section 351 while Pacheco was absent from the state.

The trial court sustained the demurrer without leave to amend in its order of March 22, 2017, for two reasons. First, the trial court determined that the second amended complaint failed to allege any facts that would toll the section 335.1 limitations period as to defendant Performance Air. Second, as to defendant Pacheco, the trial court relied on the decision in *Heritage Marketing and Insurance Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754 (*Heritage Marketing*) in determining that "section 351 does not apply to resident defendants who are permanently absent from California because it violates the Commerce Clause." The court therefore ruled that the two-year limitations period provided by section 335.1 was not tolled and Ibanez's action was time-barred. An order of dismissal was entered on May 18, 2017. Ibanez filed a timely notice of appeal from the order.[4]

IV. DISCUSSION

On appeal, Ibanez contends that the trial court erred because the section 335.1 two-year limitations period for personal injury actions is tolled pursuant to section 351 under the facts of this case, where defendant Pacheco has moved out of California and has not engaged in interstate commerce. Ibanez does not raise any issue on appeal as to the timeliness of his action against defendant Performance Air. We will begin our evaluation of Ibanez's contentions regarding the timeliness of his action against

---

[3] Appellant's appendix lacks a copy of the two demurrers filed in this action. (See Cal. Rules of Court, rule 3.1320 [requirements for demurrer].) On our own motion, we have augmented the record with these documents. (See Cal. Rules of Court, rule 8.155(a)(1)(A) [reviewing court may order the appellate record augmented on its own motion to include documents filed in the trial court].)

[4] The order of dismissal is an appealable order. "[O]rders of dismissal 'constitute judgments . . . effective for all purposes' (§ 581d) and hence are directly appealable. (§ 904.1, subd. (a); [citation].)" (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 345, fn. 3.)

defendant Pacheco with the applicable standard of review, followed by an overview of section 351.

A. *Standard of Review*

On appeal from an order of dismissal after a demurrer is sustained without leave to amend, our review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*).) In performing our independent review of the complaint, we assume the truth of all facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 (*Evans*).) "We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged. [Citation.]" (*Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 320-321, disapproved on another ground in *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 334, fn. 15.)

Further, "we give the complaint a reasonable interpretation, and read it in context." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) But we do not assume the truth of " ' "contentions, deductions or conclusions of fact or law." ' " (*Evans, supra*, 38 Cal.4th at p.6.) We also consider matters that may be judicially noticed and facts appearing in any exhibits attached to the complaint. (§ 430.30, subd. (a); *Schifando, supra,* 31 Cal.4th at p. 1081; *Blank, supra,* 39 Cal.3d at p. 318; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 225, fn. 1.)

However, " ' "[a] demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint [and matters subject to judicial notice]; it is not enough that the complaint shows that the action may be barred. [Citation.]" [Citation.]' [Citation.]" (*Committee for Green Foothills, supra,* 48 Cal.4th at p. 42; see § 430.30, subd. (a).)

B. *Section 351*

Section 351 states: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." Section 351 was enacted as part of the 1872 California Code, and has not been amended since that time.

This court has observed that "[s]ection 351 tolls the running of the applicable statute of limitations during any period when the defendant is absent from the state. [Citations.]" (*Green v. Zissis* (1992) 5 Cal.App.4th 1219, 1222-1223.) The California Supreme Court in *Dew v. Appleberry* (1979) 23 Cal.3d 630 addressed the issue whether the statute of limitations was tolled pursuant section 351 when the absent defendant was amenable to service of process in California during the period of his absence. (*Dew v. Appleberry*, *supra*, 23 Cal.3d at p. 632.) The court "concluded that defendant's amenability to process is irrelevant under the tolling provision, and that the statute of limitations applicable to plaintiff's tort action was tolled during the period of defendant's absence from the state." (*Ibid*.)

In so ruling, our Supreme Court rejected the defendant's argument that section 351 violated his right to travel freely, stating: "section 351 . . . rationally alleviates any hardship that would result by compelling plaintiff to pursue defendant out of state. Since the statute does not penalize the exercise of a fundamental constitutional right, and in view of the statute's rational relation to a valid governmental interest, we reject defendant's claim that section 351 violates his right to travel." (*Dew v. Appleberry*, *supra*, 23 Cal.3d at p. 637, fn. omitted.)

C. *Commerce Clause*

Since *Dew v. Appleberry* was decided in 1979, a number of decisions have considered whether section 351 or similar tolling statutes violate the commerce clause of the federal constitution. As this court has noted regarding the commerce clause, "Article I of the United States Constitution grants Congress the power to regulate commerce among the several states. (U.S. Const., art. I, § 8, cl. 3.) When a state imposes a regulation that unduly burdens interstate commerce and impedes free trade, it may violate the commerce clause. [Citation.]" *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1120.)

1. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

The United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988) 486 U.S. 888 (*Bendix*) addressed an Ohio statute that tolled the four-year statute of limitations for breach of contract or fraud actions when a person or corporation was not present in the state. (*Id*. at p. 889.) The Ohio statute provided that in order to be present in Ohio, a foreign corporation was required to appoint an agent for service of process, thereby subjecting itself to the general jurisdiction of the Ohio courts. (*Ibid*.) The lower courts had ruled that the Ohio tolling statute violated the commerce clause. (*Id*. at pp. 890-891.)

The Supreme Court agreed with the lower courts, stating the following general rule for determining when a state statute violates the commerce clause: "Where the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be either a discrimination that renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one. [Citation.]" (*Bendix*, *supra*, 486 U.S. at p. 891.)

Regarding statutes of limitation, the Supreme Court stated in *Bendix*: "Although statute of limitations defenses are not a fundamental right, [citation] it is obvious that

they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere. . . . The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. [Citations.]" (*Bendix, supra,* 486 U.S. at p. 893; see also *South Dakota v. Wayfair, Inc.* (2018) ___ U.S. ___ [138 S. Ct. 2080, 2090-2091].)

The Ohio tolling statute violated the commerce clause because "[t]he Ohio statute of limitations is tolled only for those foreign corporations that do not subject themselves to the general jurisdiction of Ohio courts." (*Bendix, supra,* 486 U.S. at p. 894.) "In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations. [Citation.]" (*Ibid.*)

2. California Decisions After *Bendix*

Following the decision in *Bendix, supra,* 486 U.S. 888, several California appellate courts have considered whether applying section 351 to toll the statute of limitations for a claim against a California defendant absent from the state would violate the commerce clause.

In *Kohan v. Cohan* (1988) 204 Cal.App.3d 915 (*Kohan*) the issue was whether section 351 tolled the four-year statute of limitations (§§ 337, subd. 1, 343) that applied to an action arising from a partnership dispute while the defendant was absent from California. (*Kohan, supra,* 204 Cal.App.3d at p. 919.) The appellate court rejected the defendants' argument that section 351 violated the commerce clause under *Bendix, supra,* 486 U.S. 888, stating: "The *Bendix* case does not aid defendants. That acts giving rise to

the causes of action herein occurred in Iran while defendants were residents of that country does not affect either interstate commerce or commerce between the United States and Iran, nor does it establish that defendants were engaged in interstate commerce by any definition of that term. [Citation.]" (*Kohan, supra*, 204 Cal.App.3d at p. 924.)

The timeliness of an action to enforce a money judgment arising from the defendant's failure to pay a noncommercial promissory note made in Nevada and payable to an acquaintance in California was at issue in *Pratali v. Gates* (1992) 4 Cal.App.4th 632, 643 (*Pratali*). In finding the action timely, the appellate court stated: "[T]he 10-year statute of limitations [§ 337.5] was tolled under section 351 sometime before 1980 when [defendant] left California. Because [defendant] never returned to California, the period of limitations remained tolled up to the time of the filing of this action on the 1976 judgment." (*Id.* at pp. 638-639.)

The *Pratali* court rejected the defendant's argument that section 351 violated the commerce clause, ruling that "while section 351's tolling provision may violate the commerce clause as applied to a defendant engaged in interstate commerce, there is no showing the statute violates the commerce clause when applied to a non-commercial defendant not engaged in interstate commerce. [Citations.]" (*Pratali, supra*,4 Cal.App.4th at p. 643; accord, *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 122 [tolling under section 351 did not violate the commerce clause where the personal injury claim of emotional distress did not involve interstate commerce].)

Where the parties undisputedly engaged in interstate commerce—sale of restaurant supplies by the plaintiff, Filet Menu, Inc., to the defendant restaurant owners who refused to pay for the supplies—the issue was whether the absences of one defendant, Cheng, from California tolled the statutes of limitations for contract actions (§§ 337, subd. (1), 339, subd. (1)) under section 351. (*Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1280-1281 (*Filet Menu*).) The appellate court determined that the commerce clause is not implicated where the defendant's travel outside California is

unrelated to interstate commerce. (*Id*. at p. 1283.) Since the allegations in the complaint did not allege "the extent to which defendant Cheng's absences from the state were in the course of interstate commerce," the court concluded that the allegations failed to establish that the application of section 351 to toll the limitations period violated the commerce clause. (*Id.* at p. 1284.)

In contrast, the defendants in *Heritage Marketing, supra,* 60 Cal.App.4th 754, moved to another state for reasons of commerce. The defendants left their former employers in California and opened an allegedly competing living trust business in Texas. (*Id*. at p. 758.) The plaintiff employers brought an action against the defendants in California asserting various tort and contract theories of liability, and the defendants moved for summary adjudication on the ground that certain causes of action were time-barred under the applicable statutes of limitation. (*Ibid*.) The plaintiffs opposed the motion on the ground that the statutes of limitation were tolled under section 351. (*Ibid*.)

The court in *Heritage Marketing* determined that the defendants' movement across state lines implicated the commerce clause, and therefore application of section 351 to toll the statutes of limitation would be unconstitutional. (*Heritage Marketing, supra,* 60 Cal.App.4th at p. 764.) The court reasoned that the commerce clause was violated because the defendants would be forced either to remain residents of California until the limitations period expired or move out of state and forfeit their statute of limitations defense. (*Ibid.*)

Similarly, in *Dan Clark Family Limited Partnership v. Miramontes* (2011) 193 Cal.App.4th 219 (*Dan Clark*), the application of section 351 to toll the statute of limitations was found to be unconstitutional under the commerce clause as applied to the facts of that case. (*Id.* at p. 233.) According to the allegations in the complaint, the plaintiff, Dan Clark, was a Texas partnership that purchased vehicles from a California seller for delivery to Texas. (*Id.* at p. 223.) The vehicles never arrived in Texas and Dan Clark eventually discovered that defendant Julieta Miramontes had registered the vehicles

in California. (*Ibid.*) Dan Clark's complaint alleged that the statute of limitations applicable to its claims against Miramontes were tolled under section 351 during the periods that defendants Julieta Miramontes and her brother Alejandro Miramontes were traveling between California and Mexico for personal reasons. (*Id*. at p. 224.)

The *Dan Clark* court rejected Dan Clark's section 351 tolling argument, ruling that "[t]he allegations of the complaint in the present case demonstrate that the Miramonteses are 'out-of-state persons' who were 'engaged in commerce' " when they purchased Dan Clark's vehicles from the person who was supposed to deliver the vehicles to Texas. (*Dan Clark*, *supra*, 193 Cal.App.4th at p. 232.) The court further ruled that "[a]pplying the tolling provisions of section 351 to a nonresident defendant engaged in commerce burdens interstate commerce in a way that applying it to a resident defendant who leaves the state for personal reasons does not. This result is impermissible under the Commerce Clause." (*Id.* at p. 234.)

3. Analysis

Our review of the pertinent decisions shows that the threshold question in determining whether the application of section 351 to toll the applicable statute of limitations violates the commerce clause whether the absent defendant has engaged in interstate commerce. "Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations *engaged in commerce*, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce." (*Bendix*, *supra*, 486 U.S. at p. 893, italics added.)

The United States Supreme Court has "identified three broad categories of activity" that constitute commerce within the meaning of the commerce clause: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce." (*United States v. Lopez* (1995) 514 U.S. 549, 558-559 (*Lopez*);

see also *United States v. Morrison* (2000) 529 U.S. 598, 610 (*Morrison*) [Congress may regulate " 'intrastate economic activity where . . . the activity substantially affected interstate commerce' "].)

In the present case, the allegations of the second amended complaint do not demonstrate that defendant Pacheco has engaged in commerce within the meaning of the commerce clause, either in his travel to Massachusetts or as a resident of Massachusetts. Pacheco is alleged to have relocated to Massachusetts for the purpose of having his family members care for him due to serious injuries that have rendered him unable to care for himself. It is further alleged that Pacheco "has not crossed any state lines for the purpose of working, earning money, making investment decisions, or being involved in any type of commerce . . . ."

Accordingly, there are no allegations in the second amended complaint from which it could be reasonably inferred that Pacheco was an out-of-state person involved in either the channels or instrumentalities of interstate commerce, persons or things in interstate commerce, or economic activities that "substantially affect" interstate commerce. (*Lopez*, *supra*, 514 U.S. at pp. 558-559; *Morrison*, *supra*, 529 U.S. at p. 610; *Bendix*, *supra*, 486 U.S. at p. 893) Absent such involvement, the commerce clause is not implicated. (See, e.g., *Pratali*, *supra*,4 Cal. App. 4th at p. 643 [noncommercial promissory note]; accord, *Mounts v. Uyeda*, *supra*, 227 Cal.App.3d at p. 122 [emotional distress claim]; *Filet Menu*, *supra*, 71 Cal.App.4th at p. 1283 [travel unrelated to interstate commerce].) Therefore, we conclude that the application of section 351 to toll the section 335.1 two-year statute of limitations for personal injury actions is permissible while Pacheco is absent from California.

Pacheco's arguments in support of a contrary conclusion are not convincing. Relying on the decision in *Heritage Marketing*, *supra*, 60 Cal.App.4th 754, Pacheco contends that the commerce clause is implicated whenever a defendant moves permanently from the state after the cause of action accrues. According to Pacheco, it is

reasonable to infer from the allegations of the second amended complaint that he has moved permanently to Massachusetts.

In particular, Pacheco relies on the *Heritage Marketing* court's statement that "[a]pplying section 351 *under the facts of this case* would impose an impermissible burden on interstate commerce as it would force defendants to choose between remaining residents of California until the limitations periods expired or moving out of state and forfeiting the limitations defense, thus 'remaining subject to suit in California in perpetuity.' [Citation.]" (*Heritage Marketing*, *supra*, 160 Cal.App.4th at p. 764, italics added.)

Pacheco's reliance on the decision in *Heritage Marketing* is misplaced because that decision is distinguishable. As we have discussed, the facts of the case in *Heritage Marketing* implicated the commerce clause because the defendants had engaged in interstate commerce by leaving their former employers in California and opening an allegedly competing living trust business in Texas. (*Heritage Marketing*, *supra*, 160 Cal.App.4th at p. 758.) In contrast, the facts alleged in the present case do not implicate the commerce clause because it is alleged that Pacheco moved from California to Massachusetts for personal health reasons, and therefore he is not an "out-of-state person[] . . . engaged in commerce." (*Bendix*, *supra*, 486 U.S. at p. 893; see also *Dan Clark*, *supra*, 193 Cal.App.4th at p. 234 [out-of-state travel for personal reasons does not implicate the commerce clause].)

For these reasons, we have concluded that the application of section 351 to toll the section 335.1 two-year limitations period while defendant Pacheco is absent from the state does not violate the commerce clause. Accordingly, we further conclude that Pacheco's demurrer to the second amended complaint should be overruled and the order of dismissal reversed.

V. DISPOSITION

The May 18, 2017 order of dismissal is reversed and the cause is remanded to the superior court with directions to vacate its order sustaining defendants' demurrers to the second amended complaint without leave to amend and to enter a new order

(1) sustaining the demurrer of Performance Air, Inc. without leave to amend and

(2) overruling the demurrer of defendant Brian Pacheco.

_____

ELIA, ACTING P.J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

Ibanez v. Performance Air Service, Inc. et al.
H044826